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Supreme Court, U.S.
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No. 01-682

IN THE

Supreme Court of the United States

KAY BARNES, in her official capacity as Member of the Board of Police Commissioners of Kansas City, Missouri, *et al.*,
Petitioners,

v.

JEFFREY GORMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether § 203 of the Americans With Disabilities Act or § 505 of the Rehabilitation Act provide a right to recover punitive damages from a local government.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

Amici fully support the important purposes of the Americans With Disabilities Act and the Rehabilitation Act and acknowledge their obligation under the statutes to provide the disabled with non-discriminatory access to government services, programs, and activities. The court of appeals' creation by implication of a right to sue for punitive damages under section 203 of the ADA and section 505 of the Rehabilitation Act is, however, insupportable. The court's error is further compounded by its failure even to consider the potential applicability of the longstanding common law immunity of local governments from punitive damages. If affirmed, this unprecedented holding—which could result in the imposition of virtually limitless financial obligations on local governments, above and beyond the compensatory damages recovered by plaintiffs—would deplete scarce resources and undermine the efforts of *amici* and their members to comply with the anti-discrimination mandate of the ADA and Rehabilitation Act.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

1. Punitive damages are imposed for purposes of punishment and not compensation. They are "assessed over and above the amount necessary to compensate the injured party." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Thus, the Court has acknowledged that the imposition of punitive damages on local governments can result in a "strain on local treasuries and therefore on services available to the public at large." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

While punitive damages are part of the common law tradition, a federal court does not have power to construe by implication a federal statute as providing this extraordinary sanction. Rather, whether punitive damages should be available for a violation of federal law is policy decision of the highest import which must be made by Congress. The numerous statutory rights for which Congress has expressly authorized awards of punitive damages demonstrate the inappropriateness of judicial implication of this sanction.

2. It is, of course, a general principle of the Anglo-American legal tradition "'that every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citations omitted). While the Court has followed this principle in numerous cases, it has been careful to fashion legal and equitable remedies that are directed at "mak[ing] good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and not at punishing defendants in civil actions.

Contrary to the reasoning of the court of appeals, the Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), does not support judicial implication of a right to recover punitive damages. *Franklin* did not involve a claim for punitive damages. Rather, *Franklin* involved only the power of a federal court to fashion a remedy of compensatory damages where equitable remedies were clearly inadequate to

redress the injury caused by a violation of federal law. Moreover, *Franklin* is replete with suggestions that a federal court's authority to imply remedies is limited to redressing violations and does not extend to imposing punitive sanctions. *Franklin* thus does not stand for the proposition that an award of punitive damages is an appropriate remedy when Congress has been silent.

Moreover, judicial implication of a right to punitive damages violates the long-established rule of construction that a penalty must be expressly imposed by statute. The federal courts do not have power to inflict penalties where a statute does not impose them. This rule applies to both criminal and civil proceedings. As the Court has explained, "the term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1880).

3. Congress adopted the remedial scheme of Title VI of the Civil Rights Act of 1964 to enforce ADA Title II and § 504 of the Rehabilitation Act. Congress's adoption of Title VI's remedial scheme provides compelling evidence that it did not intend to authorize punitive damages awards under § 202 and § 504.

Title VI expressly provides an enforcement mechanism which authorizes a federal agency to cut off funding to a recipient if it fails to comply with the statute's anti-discrimination mandate. This sanction, however, cannot be imposed until the agency has notified the appropriate officials of the violation and "determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Judicial implication of a right to punitive damages would subvert this scheme, which is based on giving a recipient notice of, and the opportunity to voluntarily correct, a violation. Moreover, an award of punitive damages would result in the diversion of funds from compliance efforts to private plaintiffs. And

because it would expose governmental entities to substantial and unpredictable liabilities which could well exceed the level of federal funds they have received, judicial imposition of punitive damages could prompt recipients to withdraw from federal programs.

Furthermore, the Court has frequently noted that Title VI is contractual in nature. *See, e.g., Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998). It is well settled that punitive damages are not awardable for breach of contract. Thus, while recognition of a right to recover compensatory damages and obtain equitable relief is consistent with the contractual nature of Title VI and its analogs, judicial implication of a right to punitive damages would be a radical departure from settled law.

4. The court of appeals' holding is erroneous for a reason unique to governmental entities. While the court judicially implied a right to recover punitive damages because such awards "are an integral part of the common law tradition," Pet. App. 10a, the court ignored an equally important and continuing part of that tradition: that punitive damages cannot be awarded against a local government absent express statutory authorization. *See City of Newport*, 453 U.S. at 260 n.21.

While the common law acknowledges that compensation for injury is an obligation properly placed on local governments, it likewise recognizes that the traditional justifications for punitive damages—retribution and deterrence—do not apply in a suit against a local government. The retributive purpose is not served because the award punishes the taxpayers, who "took no part in the commission of the tort." *Id.* at 267. Indeed, "punitive damages imposed on a municipality are in effect a windfall to the fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the

bill." *Id.* Moreover, the deterrence purpose is not served because other mechanisms exist to punish offenders such as disciplining employees or voting officials out of office.

The Court has recognized that Congress legislates "with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotations and other citations omitted). The common law principle thus applies unless it would render the statute nugatory.

Recognition of a local government's immunity from punitive damages will not render either ADA Title II or the Rehabilitation Act nugatory. Full compensatory damages are available and provide ample deterrence of future violations. Moreover, attorney's fees are also available to the prevailing plaintiff. Punitive damages are thus not necessary to encourage the victims of disability-based discrimination to bring their complaints to court or enable them to obtain legal representation. Finally, the windfalls created by punitive damages awards against local governments could in fact be counterproductive to the Acts' affirmative purposes by decreasing the resources available to improve access to public programs and facilities. The silence of both ADA Title II and the Rehabilitation Act with respect to the local governmental immunity from punitive damages thus demonstrates that Congress "legislated with an expectation" that the immunity is retained. *United States v. Texas*, 507 U.S. at 534.

ARGUMENT

NEITHER SECTION 203 OF THE ADA NOR SECTION 505 OF THE REHABILITATION ACT PROVIDE A RIGHT TO RECOVER PUNITIVE DAMAGES FROM A LOCAL GOVERNMENT

Amici fully support the important purposes of the Americans With Disabilities Act (ADA) and the Rehabilitation Act. *Amici* further acknowledge their obligation under section 202

of the ADA, 42 U.S.C. § 12132, and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to provide the disabled with non-discriminatory access to public services, programs and activities.

Nonetheless, the decision of the court of appeals to authorize the extraordinary sanction of punitive damages against a local government involves a policy choice of the most fundamental sort which must be made by Congress's express direction and not by the federal courts through implication. Not only does the lower court's holding violate the fundamental rule that a penalty cannot be imposed by implication, it is irreconcilable with the contractual nature of the Title VI model for remedying discrimination, which expressly provides a mechanism for enforcing its anti-discrimination mandate. Moreover, while the court below sanctioned respondent's right to recover punitive damages on the ground that they are "an integral part of the common law tradition," Pet. App. 10a, it ignored an equally important rule of that tradition: "that no punitive damages are allowed [against a local government] *unless expressly authorized by statute.*" *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981) (citations omitted) (emphasis added). The judgment of the court of appeals should therefore be reversed.

A. The Court Of Appeals Erred In Implying A Right To Recover Punitive Damages Under Section 203 and Section 505

1. Punitive damages are a "quasi-criminal" sanction which "are imposed for purposes of retribution and deterrence." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). As the Court has explained, "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport*, 453 U.S. at

266-67. Indeed, punitive damages are frequently "assess[ed] . . . in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *see also BMW Of North America, Inc., v. Gore*, 517 U.S. 559, 565 (1996) (award of $4,000 in compensatory damages and $ 4 million in punitive damages); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993) (award of "$19,000 in actual damages and $10 million in punitive damages"); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (award of $51,146 in compensatory damages and $ 6 million in punitive damages).

"The policy of giving punitive damages has been a subject of much controversy." W. Page Keeton *et al.*, *Prosser And Keeton On Torts* § 2, at 11 (5th ed. 1984). *See also BMW v. Gore*, 517 U.S. 559. In the context of governmental liability, the Court has recognized that "[t]he impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial" and can result in a "strain on local treasuries and therefore on services available to the public at large." *City of Newport*, 453 U.S. at 270-71. *See also* Dan B. Dobbs, *Torts And Compensation: Personal Accountability And Social Responsibility For Injury* 674 (1985) ("Punitive damages constitute a windfall to the plaintiff perhaps at the expense of the public generally, who may bear the costs of such damages in insurance premiums . . . .").

2. It is true that "punitive damages are an integral part of the common law tradition" and "fall within the panoply of remedies usually available to American courts." Pet. App. 10a (citations omitted). These generalizations, however, do not establish that it is appropriate for a federal court to construe by implication a federal statute as providing this extraordinary sanction.

While "there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law

tradition, . . . federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc., v. Transport Workers Union of America*, 451 U.S. 77, 95 (1981) (declining to create right to contribution in Title VII action); *see also Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) ("[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law"); *cf. United States v. Eaton*, 144 U.S. 677, 687 (1892) (federal courts lack power to create and punish "common-law offenses against the United States"). As the *Texas Industries* Court further explained: "'In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.'" 451 U.S. at 646 (quoting *Northwest Airlines*, 451 U.S. at 97).

Whether and to what extent punitive damages should be available for a violation of federal law "'is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.'" *Texas Industries*, 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). The numerous statutory rights for which Congress has expressly authorized awards of punitive damages (including the employment provisions of ADA Subchapter I, 42 U.S.C. §§ 12111-12117) demonstrate the inappropriateness of judicial implication of this sanction. *See, e.g.*, 42 U.S.C. § 1981a(b) (authorizing punitive damages for intentional discrimination

by non-governmental employers); 15 U.S.C. § 15(a) (Clayton Antitrust Act); 18 U.S.C. § 1964(c) (RICO); 31 U.S.C. § 3729(a) (False Claims Act).[2]

Moreover, Congress has frequently limited the amount of punitive damages recoverable under these statutes to treble damages (and in employment discrimination cases to various limits not exceeding $300,000).[3] Congress's practice underscores the error of the decision below, which implied a right to punitive damages, subject only to the amorphous requirement that they "not be excessive." Pet. App. 16a. As the *en banc* Sixth Circuit has explained, "[i]t would be particularly unseemly for the judicial branch to create a mechanism allowing a § 504 plaintiff . . . to receive a punitive damages windfall measured in the millions of dollars, when a plaintiff

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[2] *See also* 35 U.S.C. § 284 (treble damages for patent infringement); 12 U.S.C. § 2607(d)(2) (treble damages for violation of anti-kickback requirement in settlement of federally-related mortgages); 15 U.S.C. § 1117(b) (treble damages for intentional use of counterfeit trademarks); 15 U.S.C. § 1693f(e) (treble damages for failing to correct erroneous electronic fund transfers); 25 U.S.C. § 305e(a)(2)(A) & (b) (treble and punitive damages for misrepresentation of Indian-produced goods); 11 U.S.C. § 303(i)(2)(B) (punitive damages for bad faith initiation of involuntary bankruptcy petitions); 15 U.S.C. § 1691e(b) (punitive damages in suit by individual for denial of equal credit opportunity); 42 U.S.C. § 9607(c)(3) (treble damages in suit by United States for failure to remove or remediate hazardous substance following receipt of order); 15 U.S.C. § 6604(b) (limiting punitive damages in Y2K actions to the lesser of three times the amount of compensatory damages or $ 250,000).

[3] While a plaintiff can recover punitive damages for intentional discrimination in employment under the ADA and Rehabilitation Act, *see* 42 U.S.C. § 1981a(2), Congress capped the total amount of recoverable damages based on employer size. *See id.* § 1981a(b)(3). Most significantly, the cap also applies to compensatory damages for non-pecuniary loss (such as "mental anguish" and "loss of enjoyment of life") and future pecuniary loss. *Id.* To the extent a jury awards damages for non-pecuniary loss and future pecuniary loss, the total amount of punitive damages must be reduced. Punitive damages awards will thus frequently be substantially smaller than the cap.

suing under [the employment provision] could not receive punitive damages of more than $300,000 under the mechanism created by the branches of government to which our Constitution has entrusted the enactment of legislation." *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996).

The court of appeals declined to follow *Moreno's* holding that punitive damages are not "appropriate" remedies under *Franklin*. Pet. App. 16a n.10. While the court was "sympathetic to the Sixth Circuit's concerns," *id.* at 12a, which "are hardly misplaced," *id.* at 13a, the court of appeals ultimately rejected them. In the Eighth Circuit's view, neither Congress's failure to overturn the large body of cases rejecting punitive damages claims in § 504 and Title VI cases nor its express creation of a limited right to punitive damages for intentional discrimination in employment were controlling because "[u]nder *Franklin* we are to assume that [private cause of] action to have provided all remedies," including punitive damages. *Id.* at 15a.

While acknowledging that *Franklin* requires that implied remedies be "appropriate," Pet. App. 16a, the court narrowly read this term to require only that evidence establish that the defendant had a sufficiently culpable mental state, and that the award "not be excessive." *Id.* According to the court, the term "appropriate" was not "writ so large" as to require consideration of the "legislative and judicial backdrop" of the statute. Pet. App. 16a. In the court of appeals' view, the term "appropriate" also does not require consideration of *Franklin* or its doctrinal antecedents, the question whether longstanding maxims of construction allow judicial implication of punitive damages, the nature of the remedial scheme Congress adopted in sections 203 and 505, and whether the court's holding might lead to incongruous results. As explained below, however, neither *Franklin* nor its antecedents establish that federal courts have carte blanche to impose punitive damages in the absence of express con-

gressional authorization. And the consideration of several other factors—if even necessary given the venerable prohibition on judicial implication of punitive sanctions—further demonstrates the erroneous reasoning of the court below.

4. It is, of course, a general principle of the Anglo-American legal tradition "'that every right, when withheld, must have a remedy, and every injury its *proper* redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 109) (publication year not cited)) (emphasis added). *See also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the *necessary* relief.") (emphasis added). While the Court has followed this principle in numerous cases, it has been careful to fashion legal and equitable remedies that are directed at "mak[ing] good the wrong done," *Bell*, 327 U.S. at 684, and not at punishing defendants in civil actions. *See International Bhd. Of Elec. Workers et al., v. Foust*, 442 U.S. 42 (1979); *Board of Commissioners v. United States*, 308 U.S. 343 (1939).

Thus, in *Foust* the Court refused to imply a right to punitive damages for a union member suing a union for breach of its duty of fair representation under the Railway Labor Act. *See* 442 U.S. at 48-52. The Court recognized that in some cases "actual damages caused by a union's failure to pursue grievances may be *de minimis*." *Id.* at 48. The Court thus acknowledged that "the prospect of lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair representation actions" and that "the threat of large punitive sanctions would likely affect unions' willingness to pursue individual complaints." *Id.* The Court nonetheless declined to imply a right to punitive damages, noting that "[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of

employees' rights" and that it had previously "emphasized that relief in each case should be fashioned to make the injured employee whole." *Id.* at 48-49 (citations omitted). *Cf. Board of Commissioners v. United States*, 308 U.S. at 352 (declining to imply right to pre-judgement interest and noting that county "should not be penalized").

Nor does *Franklin* support judicial implication of a right to punitive damages. In *Franklin*, the Court rejected the argument that under Title IX (20 U.S.C. §§ 1681-1688), a high school student who was subjected to intentional sex-based discrimination was entitled only to equitable remedies. *See* 503 U.S. at 75-76. Because the equitable remedies which were suggested by the defendant (backpay and prospective relief) were "clearly inadequate," and would have left the plaintiff "remediless" under the circumstances of the case, the Court held that the student was entitled to seek compensatory damages to enforce her rights under Title IX. *Id.* at 76.

As the Sixth Circuit explained, "[t]he availability of punitive damages was not at issue in *Franklin*." *Moreno*, 99 F.3d at 789 & n.3; *see Franklin*, 911 F.2d 617, 618, 622 (11th Cir. 1990). Moreover, *Franklin* is replete with references suggesting that the authority to imply remedies is limited to redressing violations and does not include imposing punitive sanctions. *See* 503 U.S. at 66 (quoting *Bell*, 327 U.S. at 684) ("'[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*.'") (emphasis added); *id.* ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies *to redress injuries* actionable in federal court . . . .") (emphasis added); *id.* at 68 (discussing and quoting *J.I.Case Co. v. Borak*, 377 U.S. 426, 435 (1964)) ("The Court concluded that the federal courts 'have the power to grant all *necessary remedial relief*

for violations of " the SEC Act) (emphasis added).[4] *Franklin* thus stands for no more than an application of the "general rule . . . that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71.

As the foregoing demonstrates, neither *Franklin* nor its jurisprudential antecedents support the notion that a federal court can infer from congressional silence a right to seek punitive damages. Indeed, the court of appeals cited no case in which this Court has found an implied right to recover the extraordinary sanction of punitive damages in a federal statutory scheme.[5] This is for good reason as judicial

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[4] The *Franklin* Court further explained that in the decade prior to *Cannon v. University of Chicago*, 441 U.S. 677 (1979), "the Court had approved a damages remedy" in three cases: *J.I. Case Co.*, 377 U.S. at 433; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *See Franklin*, 503 U.S. at 72. None of these cases, however, involved a claim for punitive damages. *See Sullivan*, 396 U.S. at 239 (Suit under 42 U.S.C. § 1982; noting that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards"); *Wyandotte Transp. Co.*, 389 U.S. at 195 (suit under Rivers and Harbors Act of 1899 (33 U.S.C. § 409) by United States seeking reimbursement of costs to remove shipwreck); *J.I. Case Co.*, 377 U.S. at 435 (suit under SEC Act of 1934, 15 U.S.C. § 78n(a); "Our finding that federal courts have the power to grant all necessary remedial relief is not to be construed as any indication of what we believe to be the necessary and appropriate relief in this case.").

[5] In *Smith v. Wade*, 461 U.S. 30 (1983), the Court held that punitive damages are available in a suit against a governmental official under 42 U.S.C. § 1983. The defendant, however, "concede[d]" that punitive damages were available; the issue in the case was whether recklessness or malice was required to establish liability. 461 U.S. at 35 (quotations and citations omitted); *see id.* at 37. Moreover, section 1983 expressly provides that a person who causes a deprivation of a federal right "shall be liable to the party injured in an action at law" and the Court has frequently observed that section 1983 "create[s] 'a species of tort liability.'" 461 U.S. at 34 (quoting *Carey v. Piphus*, 435 U.S. 247, 253

implication of this sanction would usurp Congress's role and deprive civil defendants of fair notice as to their potential liability. And the Eighth Circuit's reading of *Franklin*—that a court is "to assume" the Title VI cause of action "to have provided all remedies," Pet. App. 15a—turns on their head longstanding principles of statutory construction.

This Court has frequently explained that "one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (quoting *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905)). "Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced." *Elliott v. Railroad Co.*, 99 U.S. 573, 576 (1878).

While this rule is most commonly applied in criminal prosecutions, it has long been applied in civil actions. "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1880). By definition punitive damages impose penalties. *See* discussion *supra* at 6-7. The court of appeals' holding thus rests on a "fallacy" because it "assum[es] that courts have power to inflict penalties, although the law has not imposed them." *Keppel*, 197 U.S. at 363; *cf. Bifulco v. United* States, 447 U.S. 381, 387 (1980) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an

(1978) & *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)); *see also Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

Most significantly, the remedial provisions at issue here are based on a contractual rather than a tort model. *See* discussion *infra* 16-19. *Smith* thus provides no authority for the court of appeals' holding.

individual when such an interpretation can be based on no more than a guess as to what Congress intended.") (citation and internal quotation omitted).

Reaffirmance of this longstanding rule is particularly important as applied to the schemes of the ADA and Rehabilitation Act. As a general matter, the rule should be reaffirmed because it protects the citizenry and government officials from the patent unfairness of being subjected to potentially crippling punitive liability without clear notice. Moreover, while *amici* and their members fully endorse the objectives of the ADA and Rehabilitation Act, complying with the statute's anti-discrimination mandate is highly complex requiring a detailed understanding of the statutes' application in a wide variety of settings. *See, e.g.*, Pet. App. 49a (earlier opinion of court of appeals affirming grant of qualified immunity to arresting officers).[6] Consistent with its long-established rules of construction, the Court can decide this case solely on the basis that the judgment below violates the prohibition on judicial implication of punitive sanctions.

5. The remedial schemes Congress enacted in ADA § 203 and Rehabilitation Act § 505(a)(2) provide compelling evidence that Congress did not intend to authorize punitive damages. Section 203 incorporates "[t]he remedies, procedures, and rights set forth" in section 505, 42 U.S.C.

[6] In its 1998 opinion upholding the district court's grant of qualified immunity to the arresting officers, the court of appeals explained:

> At the time of Gorman's arrest in May of 1992, Title II of the ADA had only been in effect for some four months. Despite the clear language of the statute, there was uncertainty about the extent of its coverage. There were no cases addressing its possible application to government agencies like police departments or to the transportation of arrestees. Although there were some cases applying the Rehabilitation Act to prisons, there were none dealing with facts similar to those alleged by Gorman.

Pet. App. 49a.

§ 12133, which, in turn, incorporates "[t]he remedies, procedures, and rights set forth in [T]itle VI." 29 U.S.C. § 794a; *see* Pet. App. 12a (opinion of court of appeals). The remedial provisions of sections 203 and 505(a)(2) are thus based on the Title VI model for remedying discrimination. The court erred in holding that "Congress assumed the availability of all remedies, including punitive damages, under Title VI," and that "logic dictates[] the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202." Pet. App. 11a-12a.

The court of appeals' syllogism rests on the erroneous premise that punitive damages are available under Title VI. While the court of appeals dismissed the "virtual unanimity" of the numerous pre-*Franklin* decisions, which rejected punitive damages claims under both Title VI and section 504, *see Moreno*, 99 F.3d at 790; Pet. App. 12a-13a, 16a n.10, it failed to conduct any inquiry into the nature of Title VI's remedial scheme. As explained below, punitive damages are fundamentally inconsistent with Title VI's model of remedying discrimination.

Title VI "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998). The Court has long recognized the contractual nature of Title VI. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974) ("Respondent school district contractually agreed to comply with title VI of the Civil Rights Act of 1964 . . . .") (internal quotation and citation omitted); *see also Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 599 (1983) (opinion of White, J.) (Title VI is a "typical 'contractual' spending power provision"); *id.* at 630 (Marshall, J., dissenting) ("applicants for federal assistance literally sign contracts in which they agree to comply with Title VI"); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power

is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.").

The contractual nature of Title VI imposes several fundamental limitations on the scope of the statute's remedies that preclude the implication of punitive damages. The first derives from the structure of Title VI, which expressly provides an enforcement mechanism for its anti-discrimination mandate. *See* 42 U.S.C. § 2000d-1. This provision authorizes a federal agency to "terminat[e] . . . or refus[e] to grant or . . . continue assistance" to the offending recipient. *Id.*[7] A federal agency cannot impose this severe sanction, however, "until [it] has advised the appropriate person or persons of the failure to comply . . . and has determined that compliance cannot be secured by voluntary means." *Id.* Moreover, before cutting off or denying funding, a federal agency must report to the congressional committees "having legislative jurisdiction over the program," which exercise oversight to ensure that this sanction is warranted. *Id.*

Implication of a private right to punitive damages would subvert this scheme, which is based on giving a recipient notice of, and the opportunity voluntarily to correct, a violation.[8] *See Gebser*, 524 U.S. at 288; *Moreno*, 99 F.3d at

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[7] While section 602 authorizes an agency "to promulgate disparate-impact regulations" which are not enforceable in a private right of action, *Alexander v. Sandoval*, 532 U.S. 275, 286-93 (2001), the disparate treatment prohibition of section 601 has been promulgated in the C.F.R. along with additional regulations construing the prohibition. *See, e.g.*, 28 C.F.R. § 42.104(a) & (b)(1). The disparate treatment regulations are enforceable through both a private right of action and by the agency through the termination procedure of section 602.

[8] The Title VI scheme has been adopted in the Department of Justice's ADA Title II regulations. *See* 28 C.F.R. Pt. 35, App. A, Subpart F - Compliance Procedures, at 537 (2001). As the appendix states:

> Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that

791-92. Moreover, an award of punitive damages would result in the diversion of funds from compliance efforts to plaintiffs. Indeed, the awards could frequently exceed the potential sanction involved in a termination of federal funds. *See Gebser*, 524 U.S. at 290. Even more than the *respondeat superior* liability which the Court rejected in *Gebser*, awards of punitive damages would "divert[] . . . funding from beneficial uses." *Id.* at 289.

That Congress did not adopt a tort-type scheme to enforce ADA Title II but instead used Title VI's contract-based model of enforcement is significant for a further reason. "The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach." *Restatement (Second) of Contracts* 100 (1981) (Introductory Note). Accordingly, "punitive damages have not been awarded for breach of contract." *Id.* As McCormick explains, "[i]n actions . . . upon mere private contracts . . . even where the breach is malicious and unjustified, exemplary damages are not allowable." Charles T. McCormick, *Handbook of the Law of Damages* § 81, at 286 (1935); *see also* 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 7.2, at 385-86 (4th ed. 2000) ("[I]t is . . . well established that punitive damages cannot be recovered for a mere breach of contract. This is true no matter how reprehensible the breach was by the defendant.") (footnotes omitted).

The reason for the rule is twofold. The first is that punitive damages are "usually regarded as an anomaly," and should be

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is where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance.

Id. at 547.

"restrict[ed]." McCormick, at 291. The second stems from the recognition "that, since the vast majority of breaches of contract are due to inability or to erroneous beliefs as to the scope of the obligation, it is of doubtful wisdom to add to the risks imposed on entering into a contract this liability to an acrimonious contest over whether a breach was malicious or fraudulent and the danger of a large and undefined recovery of punitive damages." *Id.* at 291 & n.41.

While recognition of a right to recover compensatory damages and obtain equitable relief is consistent with the "contractual nature" of Title VI and its analogs, judicial implication of a punitive damages remedy would be a radical departure from the settled understanding. It would expose recipients to substantial and unpredictable liabilities, which could frequently "exceed a recipient's level of federal funding," *Gebser*, 524 U.S. at 290, and also consume a large portion of state and local funds. If subjected to such liability, recipients will reevaluate "the benefits and burdens" of accepting federal funds and may well choose to "terminate [their] receipt of federal money [rather] than assume [this] unanticipated burden[]." *Guardians*, 463 U.S. at 596 (opinion of White, J.). Judicial imposition of the tort-type right to recover punitive damages on what is essentially a contractual scheme, would thus prompt recipients to withdraw from many federal programs and undermine important civil rights goals.[9]

6. The court of appeals' implication of a private right to recover punitive damages also renders the ADA scheme highly incongruous. Under Title III, which applies to private entities operating public accommodations, a person subject to

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[9] While Title II of the ADA, unlike the Rehabilitation Act, is not limited to those instances where a local government has accepted federal funds, the existence of such programs is ubiquitous. And Congress nonetheless expressly incorporated the Title VI remedial scheme in ADA Title II.

discrimination can be awarded money damages only if the Attorney General brings suit and requests them. *See* 42 U.S.C. § 12188(b)(1)(B) & (2)(B). Punitive damages are expressly prohibited, *see id.* § 12188(b)(4); only a civil penalty can be assessed, which is payable to the U.S. Treasury and limited to a fraction of the amount of the punitive damages awarded here. *See id.* § 12188(b)(2)(C) (penalty not to "exceed[] $ 50,000 for a first violation" and "$100,000 for any subsequent violation").

The court of appeals' holding thus leads to several incongruous results. First, non-governmental entities have limited exposure to monetary penalties. State and local governmental entities are, however, subject to potentially devastating punitive damages awards. Indeed, in this case the punitive damages award is twenty-four times greater than a private firm's exposure would be under Title III. *See* Pet. App. 4a. Second, private firms pay their penalties to the U.S. Treasury, where it is used in furtherance of the public interest. State and local entities, however, would pay punitive damages awards to private plaintiffs. Given the important purposes of the ADA and Rehabilitation Act, it would be counterproductive to create a scheme which redirects governmental resources from compliance efforts to private parties.

Finally, Congress immunized for-profit entities from punitive damages liability notwithstanding that such entities are generally liable for punitive damages awards. Under the court of appeals' view, however, Congress subjected state and local government entities to punitive damages notwithstanding that public entities have traditionally enjoyed immunity from such claims and retain the immunity even when they have been made liable for compensatory damages. The resulting scheme cannot be sustained.

B. Neither ADA Title II Nor The Rehabilitation Act Abrogate The Common Law Immunity Of Local Governments From Punitive Damages

While the court of appeals erred in implying a punitive damages remedy, the holding below is erroneous for a further reason. The claims remaining in this suit were brought against the defendant members of the police board in their official capacities and thus constitute a suit against a local governmental entity. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Without so much as an afterthought, the court below sanctioned "the novel specter of punitive damages against municipalities," *City of Newport*, 453 U.S. at 266, ignoring the well established common law immunity of a local government from punitive damages liability absent an express statutory authorization. *See id.* at 260 n.21 (citing 18 Eugene McQuillin, *Municipal Corporations* § 53.18a (3d rev. ed. 1977)).

In *City of Newport* the Court held that 42 U.S.C. § 1983, which creates a remedy against any person who, acting under color of state law, deprives another of a federal right, did not abrogate the common law immunity of municipal governments from punitive damages. As the Court observed, while "[i]t was generally understood by 1871 [when § 1983 was enacted] that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, . . . this understanding did not extend to the award of punitive . . . damages." 453 U.S. at 259-60 (footnote omitted); *see also id.* at 260 ("[T]he courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation.").

Moreover, the immunity is as vital today as it was in 1871. As *City of Newport* explained, "[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions." *Id.* (footnote and citations omitted). Contemporary treatises

agree. As one authority observes, "[i]n the overwhelming majority of jurisdictions which have considered the question, it is now firmly established that exemplary or punitive damages are not recoverable [from municipalities] unless expressly authorized by statute . . . ." 18 Eugene McQuillin & Stephen M. Flanagan, *The Law Of Municipal Corporations* § 53.18a, at 220-21 (3d rev. ed. 1984). *See also* 1A Chester James Antieau & John Michael Antieau, *Antieau's Local Government Law* § 11.233, at 11-345 (1998) ("By the weight of present authority, punitive damages are not recoverable in tort actions against local governments, in the absence of a statute specifically authorizing the award of such damages.").

Thus, while the common law acknowledges that "[c]ompensation [i]s an obligation properly shared by the municipality itself," *City of Newport*, 453 U.S. at 263, it likewise recognizes that the traditional justifications for punitive damages—retribution and deterrence—do not apply in a suit against a local government. As McQuillin explains, the retributive purpose is not served because "'the parties who must bear the burden of the punishment are the taxpayers and citizens who constitute the very persons who as a group are to benefit from the public example which the granting of such damages is supposed to make of a wrongdoer.'" *Municipal Corporations* § 53.18a, at 221 (quoting *Fisher v. Miami*, 160 So.2d 57, 59 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So.2d 455 (Fla. 1965)). And the Court, in *City of Newport*, has similarly noted "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party." 453 U.S. at 267.

The common law courts have also recognized that the deterrence function is not served by an award of punitive damages against a local government. "'It is assumed that public officials will do their duty, and if discipline of a wrongdoing municipal employee is indicated, appropriate

measures are available through the electorate, or by superior officials responsible to the electorate, without recourse to punitive awards through the courts.'" McQuillin, *Municipal Corporations*, § 53.18a, at 221 (quoting *Ranells v. Cleveland*, 321 N.E.2d 885, 888 (Ohio 1975)) (internal quotation and other citation omitted).

Adopting this reasoning, the Court has rejected the contention that punitive damages against governmental entities are necessary to prompt local officials to take corrective action. *City of Newport* thus observed that "'[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.'" 453 U.S. at 269 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). And the Court further explained that "[t]his assumption is no less applicable to the electorate at large. . . . [I]f additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." *Id.*

The Court has further recognized that a punitive damages award could impose grave harm on a local government's ability to meet the needs of its citizenry. In *City of Newport*, the Court stated that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267. Indeed, "[b]ecause evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award . . . . [which] is likely to be both unpredictable and, at times, substantial. . . ." *Id.* at 270-71 (footnote omitted).

In *City of Newport*, the Court noted that Congress in enacting § 1983 had not "specifically . . . provided [that] it wished to abolish the [immunity] doctrine," and that "[n]othing in the legislative debates suggests that . . . Congress intended any such abolition." *Id.* at 263-64 (internal quotations and citations omitted). Because "[n]either reason nor justice" supports punitive damages awards against local governments, *id.* at 267, the Court held that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 271.

The language of the remedial provisions of sections 505 (Rehabilitation Act) and 203 (ADA) likewise does not provide any express textual indication of Congress' intent to abrogate the common law immunity of local governments from punitive damages. The Court has clearly instructed that "'courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (other citation and internal quotations omitted)). Thus, "'[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (quoting *United States v. Texas*, 507 U.S. at 534). "[A] statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required[.]" *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). And the Court has further explained that "the pre-existing right [must be] so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Id.*

Judicial recognition of local governments' longstanding immunity from punitive damages will not render either the Rehabilitation Act or the ADA nugatory. The statutes'

purpose of eliminating discrimination against the disabled is fully effectuated by the remedies of injunctive relief and compensatory damages. An analysis of the justifications for punitive damages demonstrates that a plaintiff's inability to obtain such an award will not "deprive the . . . statute[s] of [their] efficacy." *Id.*

One of the traditional justifications for punitive damages was the common law's failure to provide compensation for non-economic loss. *See* 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 1.3(c), at 7-8 (4th ed. 2000). *Franklin*, however, expressly authorizes the recovery of damages for non-economic loss, *see* 503 U.S. at 76, and in this case respondent was awarded $150,000 in damages "for pain and suffering." Pet. App. 21a. The statutory schemes at issue here thus do not provide inadequate compensation to the victims of disability-based discrimination. Punitive damages awards are not necessary to provide full compensation.

The other common justification for punitive damages is that they provide "a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees[.]" *Prosser & Keeton on Torts* § 2, at 12; *see also* McCormick, *Handbook on the Law Of Damages* § 77, at 277 (describing the "substantial argument" that "the award of [punitive] damages remedies . . . one of the glaring defects in our system, which is the denial of compensation for actual expenses of litigation, such as counsel fees"). Section 505 of the ADA, however, expressly authorizes an award of attorney's fees as well as "litigation expenses, and costs." 42 U.S.C. § 12205; *see also* 29 U.S.C. § 794a(b) (authorizing attorney's fees in Rehabilitation Act litigation).

Moreover, to the extent deterrence of future violations "is a primary purpose of" either Subchapter II of the ADA or the Rehabilitation Act, *see City of Newport*, 453 U.S. at 268, subjecting local governments to punitive damages liability is

no more necessary to achieve this objective than it is under Section 1983. Compensatory awards provide ample deterrence. Indeed, the windfalls created by punitive damages awards against local governments could be counter-productive to the Acts' purposes by decreasing the resources available to reduce discriminatory barriers and improve access to public programs and facilities. As the First Circuit has explained in a related context, "[d]eterrence is a function of degree, and nothing in the Rehabilitation Act or in the case law commands that it be maximized at all costs. . . . [M]aximizing deterrence might well interfere with the measured achievement of other statutory goals." *Lussier v. Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995) (footnote omitted).

The traditional immunity of local governments from punitive damages is plainly not "so repugnant" to either the ADA or Rehabilitation Act as to "deprive [either] statute of its efficacy" or "render its provisions nugatory." *Texas & Pacific Ry.*, 204 U.S. at 437. The silence of both schemes in this regard demonstrates that Congress "legislated with an expectation" that the immunity was retained. *United States v. Texas*, 507 U.S. at 534 (internal quotation and other citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

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